

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DENNIS FLOERER,

Plaintiff,

v.

WILLIAM PECK, et. al.,

Defendants.

NO. CV-05-5039-EFS

**ORDER ENTERING COURT'S ORAL
RULINGS FROM AUGUST 19, 2008
PRETRIAL CONFERENCE**

A pretrial conference occurred in the above-captioned matter on August 19, 2008, in Richland. Plaintiff Dennis Florer appeared *pro se*; Sara J. Olson, Jason M. Howell, and Peter Berney appeared on behalf of Defendants Diane Benfield and Sean Murphy. Before the Court were several pretrial motions and objections to witness lists, exhibits lists, and deposition designations. This Order serves to memorialize and supplement the Court's oral rulings.

Accordingly, **IT IS HEREBY ORDERED:**

A. Plaintiff's Motions *In Limine* (Ct. Rec. 507) are **GRANTED AND DENIED IN PART** as follows:

1. Prior Convictions: **GRANTED AND DENIED IN PART** for the reasons articulated on the record. Plaintiff stipulated that his 2003

1 conviction for felony hit-and-run and 1999 conviction for attempting to
2 elude are admissible for impeachment purposes. As for Plaintiff's other
3 prior convictions, Federal Rule of Evidence (FRE) 609(a)(1) states that
4 evidence of a crime other than one involving dishonesty or false
5 statement that is punishable by death or imprisonment in excess of one
6 year "shall be admitted, subject to Rule 403." FED. R. EVID. 609.
7 FRE 403 states that, "[a]lthough relevant, evidence may be excluded if
8 its probative value is substantially outweighed by the danger of unfair
9 prejudice" FED. R. EVID. 403. Courts consider five (5) factors
10 in determining whether FRE 609(a)(1) convictions are admissible:

- 11 (1) the impeachment value of the prior crime;
- 12 (2) the point in time of the conviction and the witness' subsequent
13 history;
- 14 (3) the similarity between the past crime and the charged crime (or
15 the allegations at issue);
- 16 (4) the importance of the witness' testimony; and
- 17 (5) the importance of the witness' credibility

18 *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000).

19 Plaintiff's 2003 felony conviction for possessing stolen property
20 and 1999 felony conviction for second-degree assault are not admissible
21 under FRE 609(a)(1) because the convictions' probative value for
22 truthfulness are substantially outweighed by the danger of unfair
23 prejudice because a jury could infer that Plaintiff, with three (3)
24 previous felony convictions, is imprisoned on a "three strikes policy"
25 or is considered to be a "lifer," i.e., the worst kind of person. Such
26 inferences are not permissible. Were they the only two convictions, they
would be admissible under FRE 609(a)(1).

1 Defendants alternatively seek to admit Plaintiff's 2003 conviction
2 for possessing stolen property under FRE 609(a)(2). The Court declines
3 to do so, finding there is not enough evidence to ascertain whether the
4 offense involved an element of deceit or other indicium of a propensity
5 to lie. See *United States v. Foster*, 227 F.3d 1096 (9th Cir. 2000).

6 2. Other Cases Against the Department of Corrections (DOC):
7 **GRANTED**. Defendants may not mention Plaintiff's other pending cases with
8 the DOC unless he opens the door to admissibility at trial.

9 3. Disciplinary History: **GRANTED IN PART**. Infractions relevant
10 to Plaintiff's claims are admissible; other infractions are not.
11 Defendants may introduce other disciplinary history if Plaintiff opens
12 the door to admissibility at trial.

13 4. Extensive Exercise and Flushing Food: **DENIED**.

14 5. Application to Plaintiff's Witnesses: **GRANTED**.

15 6. Limiting Defendants to One Lawyer for Trial: **DENIED**.

16 7. Religious Issues Concerning Diet: **GRANTED**. Religious issues
17 have no bearing on the remaining claims. Exclusion is appropriate.

18 B. Plaintiff's Objections to Defendants' Witness List (**Ct. Rec. 510**)
19 are **OVERRULED IN PART** as follows:

20 1. Sean Murphy: **OVERRULED**. Mr. Murphy is a named defendant and
21 has a right to testify and rebut Plaintiff's retaliation allegation.

22 2. Ronald Knight: **OVERRULED**. Mr. Knight was a former
23 Correction Program Manager at Washington State Penitentiary (WSP) during
24 the relevant time frame and has direct knowledge about WSP confinement
25 policies. Cumulative testimony objections shall be addressed at trial.

1 3. Mark Hill: **OVERRULED**. Mr. Hill participated in Plaintiff's
2 alleged retaliatory cell transfer, making his testimony directly relevant
3 to rebut the retaliation claim.

4 4. Donald Zarndt: **OVERRULED**. Mr. Zarndt participated in
5 Plaintiff's alleged retaliatory cell transfer, making his testimony
6 directly relevant to rebut the retaliation claim. Cumulative testimony
7 objections shall be addressed at trial.

8 5. Kimberly Kiesz: **OVERRULED**. Ms. Kiesz is WSP's medical
9 record custodian and will be necessary to authenticate exhibits at trial.

10 6. Devon Schrum: **OVERRULED**. Ms. Schrum is WSP's grievance
11 officer and will testify that Plaintiff failed to exhaust his
12 administrative remedies regarding his retaliation claim.

13 7. Ann Lachney: **OVERRULED**. The Court previously determined Ms.
14 Lachney is qualified to provide expert testimony on the nutritional
15 adequacy of WSP's 2004 kosher diet.

16 C. Plaintiff's Objections to Defendants' Designations of Lachney
17 Deposition (**Ct. Rec. 523**) is **OVERRULED AS MOOT**. Deposition designations
18 are necessary only when used in lieu of calling a witness at trial. See
19 LR 32.1. Because Ms. Lachney will be testifying in person at trial, her
20 deposition designations - and Plaintiff's objections to those
21 designations - are irrelevant.

22 D. Plaintiff's Objections to Defendants' Exhibit List (**Ct. Rec. 511**)
23 are **OVERRULED, SUSTAINED, and RESERVED** as follows:

Exhibit	Ruling
500	Reserved until trial
501	Overruled

1	502	Overruled in Part. The primary encounter reports dated 8/17/04, 9/28/04, and 11/30/04 are relevant and admissible. These entries fall under the FRE 803(4) hearsay exception.
2	503	Overruled
3	504	Reserved until trial
4	505	Reserved until trial
5	506	Reserved until trial
6	507	Sustained. Exhibit withdrawn.
7	508	Overruled
8	509	Overruled
9	510	Overruled
10	511	Overruled
11	512	Overruled
12	513	Overruled
13	514	Overruled in Part. Defendants shall redact all non-relevant entries in the prison log. This document falls under the FRE 803(6) hearsay exception.
14	515	Overruled
15	516	Overruled
16	517	No Objection
17	518-532	Exhibits Withdrawn
18	533-538	No Objections
19	539	Exhibit Withdrawn
20	540	Exhibit Withdrawn
21	541	No Objection
22	542	No Objection
23	543	Attachments Withdrawn
24	544	Attachments Withdrawn
25		
26		

1 E. Plaintiff's Motion for Issuance of Subpoenas (**Ct. Rec. 521**) is
2 **GRANTED AND DENIED IN PART** as follows:

3 1. Cheryl Johnson: **DENIED**. Defendants represent that no
4 subpoena is needed.

5 2. Cliff Stallings: **DENIED**. Neither party can locate a current
6 address for Mr. Stallings.

7 3. Robert Mitchell: **GRANTED IN PART**. The Court shall issue a
8 subpoena to Mr. Mitchell once Plaintiff identifies the day Mr. Mitchell
9 will testify.

10 4. Steve Henderson: **DENIED**. The Court previously concluded Mr.
11 Henderson will not be permitted to testify.

12 5. Jimi Hamilton: **DENIED**. Defendants represent that no
13 subpoena is needed.

14 6. Roland Pitre: **DENIED**. Defendants represent that no subpoena
15 is needed.

16 7. Don Coots: **GRANTED IN PART**. The Court shall issue a
17 subpoena once Plaintiff identifies Mr. Coots' current address and the day
18 he will testify.

19 8. Larry Hargrove: **DENIED** for the reasons articulated on the
20 record.

21 9. Diane Benfield: **DENIED**. Defendants represent that no
22 subpoena is needed.

23 10. Chris McPherrren: **GRANTED IN PART**. The Court shall issue
24 a subpoena once Plaintiff identifies Mr. McPherrren's current address and
25 the day he will testify.

26 11. Keri Robinson: **DENIED** for the reasons articulated on the
record.

12. Keith Powers: **GRANTED**. The Court shall issue a subpoena once Plaintiff identifies Mr. McPherrren's current address and the day he will testify.

13. Patricia Gleason: **DENIED** for the reasons articulated on the record.

14. Brad Simpson: **DENIED** for the reasons articulated on the record.

F. Plaintiff's Motion for Reconsideration as to Cheryl Johnson (**Ct. Rec. 494**) is **DENIED** for the reasons articulated on the record.

G. Plaintiff's Motion for Reconsideration as to Non-Consumable Meals (**Ct. Rec. 496**) is **DENIED** for the reasons articulated on the record.

H. Defendants' Motions *in Limine* (**Ct. Rec. 502**) are **GRANTED AND DENIED IN PART** as follows:

1. Compliance with Federal Rules of Civil Procedure: **GRANTED**.

2. Limiting Evidence to Remaining Claims: **GRANTED**. Plaintiff shall not be permitted to offer testimony or introduce evidence concerning: 1) previously dismissed claims; 2) previously dismissed defendants; 3) WSP's kosher diet outside the relevant time frame (2004 until early 2005); and 4) incidents beyond the alleged June 21, 2004 retaliatory cell transfer.

3. Eliciting Testimony Consistent with Courtroom Practice: **GRANTED IN PART**. Plaintiff must comply with standard evidence rules except that he may narrate his own testimony when testifying.

4. Excluding Ann Lachney's Deposition from Evidence: **GRANTED IN PART**. Ms. Lachney's deposition is admissible for impeachment purposes only.

1 5. Excluding Evidence Suggesting Plaintiff's Criminal
2 Conviction or Sentence is Improper: **GRANTED.**

3 6. Settlement Negotiation Evidence: **GRANTED.** Settlement
4 discussions regarding Plaintiff's claims fall within the scope of
5 FRE 408(a) and are properly excluded.

6 7. Parties' Financial Conditions: **GRANTED.** The parties'
7 financial conditions are not relevant.

8 8. Quality of Legal Resources Available to Parties: **GRANTED.**

9 9. Golden Rule: **GRANTED.** Plaintiff is forbidden from asking
10 the jurors to "put themselves in his position."

11 10. Decisions Not to Call Witnesses: **GRANTED.**

12 11. Evidence Not Disclosed During Discovery: **GRANTED.**

13 12. Prior Conviction Admissibility: **GRANTED AND DENIED IN PART.**
14 See Section A-1 *supra*.

15 I. Defendants' Objections to Plaintiff's Witness List (**Ct. Rec. 504**)
16 are **OVERRULED, SUSTAINED, AND SUSTAINED IN PART** as follows:

17 1. Cheryl Johnson: **SUSTAINED IN PART.** Because Plaintiff
18 untimely disclosed Ms. Johnson as an expert, she is permitted to testify
19 only as a fact witness.

20 2. Robert Mitchell: **SUSTAINED IN PART.** Because Plaintiff
21 untimely disclosed Mr. Mitchell as an expert, he is permitted to testify
22 only as a fact witness about the physical exam he performed on Plaintiff.

23 3. Jimi Hamilton: **SUSTAINED IN PART.** Mr. Hamilton is permitted
24 to testify about Defendant Murphy's character - nothing more.

25 4. Roland Pitre: **SUSTAINED IN PART.** Mr. Pitre is permitted to
26 testify about the portion size of Clallum Bay Correction Center's kosher
diet - nothing more.

1 5. Don Coots: **OVERRULED** for the reasons articulated on the
2 record.

3 6. Larry Hargrove: **SUSTAINED**. Defendants will stipulate that
4 they did not keep as-served menus with respect to the kosher diet.

5 7. Individuals Listed in Ann Lachney's Report: **SUSTAINED IN**
6 **PART**. Patricia Gleason, Kerri Robinson, and Brad Simpson shall not be
7 permitted to testify for the reasons articulated on the record. Keith
8 Powers is permitted to testify about WSP's kosher menu portions; Chris
9 McPherren is permitted to testify about the nutritional labeling on WSP's
10 kosher meals.

11 8. Cliff Stallings: **SUSTAINED**.

12 J. Defendants' Objection to Plaintiff's Designations of Lachney
13 Deposition (**Ct. Rec. 517**) is **SUSTAINED**. Deposition designations are
14 necessary only when used in lieu of calling a witness at trial. See LR
15 32.1. Because Ms. Lachney will be testifying in person at trial, her
16 deposition designations are irrelevant.

17 K. Defendants' Objections to Plaintiff's Exhibit List (**Ct. Rec. 518**)
18 are **OVERRULED, SUSTAINED, and RESERVED** as follows:

Exhibit	Ruling
1	Sustained
2	Reserved until trial
3	Sustained
4	Sustained in Part. Nutrition reports and documents discussing the vegan diet are not admissible
5	Sustained in Part. Admissible for impeachment purposes only
6	Sustained in Part. Admissible for impeachment purposes only

1	7	Sustained in Part. Admissible for impeachment purposes only
2	8	Sustained in Part. Admissible for impeachment purposes only
3	9	Sustained in Part. Admissible for impeachment purposes only
4	10	No Objection
5	11	No Objection
6	12	Sustained
7	13	Overruled
8	14	Overruled
9	15	No Objection
10	16	Sustained
11	17	Sustained
12	18	Sustained
13	19	Sustained
14	20	Overruled
15	21	Reserved until trial
16	22	Reserved until trial
17	23	Reserved in Part until trial. The Military weight table is not relevant and therefore not admissible.
18	24	Reserved until trial
19	25	Reserved until trial
20	26	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
21	27	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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1	28	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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4	29	Sustained
5	30	Overruled
6	31	Sustained
7	32	No Objection
8	33	No Objection
9	34	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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11	35	No Objection
12	36	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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15	37	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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18	38	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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21	39	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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23		
24	40	Overruled
25	41	Overruled
26	42	No Objection
	43	Sustained in Part. Admissible for impeachment purposes only

1	44	Sustained in Part. Admissible for impeachment purposes only
2	45	No Objection
3	46	Sustained
4	47	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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7	48	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
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10	49	Sustained
11	50	Sustained, but Plaintiff may request to reintroduce this exhibit at trial.
12		
13	51	Sustained
14	52	No Objection
15	53	Sustained
16	54	No Objection
17	55	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
18		
19	56	The completed exhibit is admissible.
20	57	Overruled
21	58	Overruled
22	59	No Objection
23	60	No Objection
24	61	Overruled
25	62	Overruled
26	63	Overruled

64	Sustained. This exhibit duplicates Defendants' Exhibit 52
65	Objection Withdrawn
66	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
67	Sustained subject to Defendants' stipulation
68	Sustained
69	Sustained
70	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
71	Overruled. Redacted version is admissible
72	Exhibit Withdrawn
73	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.
74	Overruled
75	No Objection
76	Sustained
77	Sustained
78	Sustained
79	Reserved until trial
80	Sustained in Part. Not admissible, but may be used to refresh recollection or read into evidence as a recorded recollection.

1 L. Defendants shall submit the Joint Proposed Pretrial Order
2 consistent with the Court's pretrial rulings **no later than August 26,**
3 **2008.**

4 M. Plaintiff shall submit a sequential trial witness list to
5 Defendants **no later than August 29, 2008.**

6 N. Defendants shall submit a sequential trial witness list to
7 Plaintiff **no later than September 5, 2008.**

8 O. Defendants shall advise Plaintiff's WSP counselor that he is
9 permitted to make photocopies for trial preparation purposes.

10 P. Defendants shall provide all deposition transcript originals for
11 trial.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this Order and distribute copies to counsel.

14 **DATED** this 22nd day of August 2008.

15
16 S/ Edward F. Shea
17 EDWARD F. SHEA
United States District Judge

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